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Get It in Writing: Legal Fees, Retainer Contracts and Newell v. Sax

by Noel Semple

Should a lawyer decide how much his client should pay him, and then write himself a cheque for that amount, without the client's agreement? Is a discretionary judicial decision about the value of a legal service an adequate substitute for an agreement between lawyer and client? In *Newell v. Sax*, the Ontario Court of Appeal effectively answered "yes" to both of these questions. In my view, arbitrary fees invented by lawyers, or judges, are a grave and unnecessary threat to legal ethics. The law should insist on upfront disclosure and clear contractual agreements about legal fees, absent very exceptional circumstances.

The Facts

Eileen Newell owned a small commercial building in Toronto's prestigious Yorkville neighbourhood. In 2014 Newell, who was 88 years old at the time, decided to sell the building. She retained lawyer Lawrence Sax, who had represented her in several matters over the course of 17 years, to represent her in the transaction. There was no written retainer agreement, and Sax did not keep any record of his time spent on the file.

The sale of Newell's property was somewhat complicated. Tax planning was involved, and estoppel certificates were required from the building's tenants. The transaction was on the rocks at one point, and the sale price was renegotiated. Sax's legal work on the transaction was apparently at least competent, and perhaps even excellent.

The property was sold for $14 million, and the proceeds were deposited in Sax's trust account. The lawyer then transferred a total of $165,000.00 to his general account, as his fee for the matter. He did not explain to Newell how the amount was calculated, or seek her consent to the fee. He only provided a bill to his client several weeks after he had paid himself the fee.

Testifying later, the 93 year old Sax estimated that he had spent a bit less than 75 hours working for Newell. Some of the 75 hours were spent on "clerical tasks such as looking for files in his storage system." Other portions of the time, it emerged, had actually been spent on previous unrelated matters for Newell. If 75 hours is accurate, the $165,000.00 Sax decided to pay himself was equal to $2,220.00 for each hour worked.

The Assessment

Newell sought an assessment of this legal fee, under Ontario's *Solicitors Act*. Assessment Officer Palmer identified two deficiencies in the lawyer's conduct: (i) his failure to record his time, and (ii) his failure to issue a bill to Newell, or receive authorization from her, before transferring the legal fee. To account for these two deficiencies, the bill was reduced by 20% to $132,000 (or $1,760 per estimated hour).

The Superior Court of Justice

The client appealed this result. Justice Morgan found that Sax's compensation should be calculated on an hourly basis. Starting with the 75 hour estimate, 25 hours were subtracted to account for the time spent on clerical and unrelated matters. As a "senior real estate solicitor," $450/hour would be an appropriate hourly rate, Justice Morgan found. He there assessed Sax's fee at $22,500, plus HST and $500 for disbursements.

The Ontario Court of Appeal

The lawyer appealed. Justice Roberts found that both Assessment Officer Palmer and Justice Morgan had been "overly mechanical." They should have used a "nuanced, contextual approach" to determine the "reasonable value of services." This *quantum meruit* method, which is also endorsed by the *Rules of Professional Conduct*, proceeds based on the nine factors identified in *Cohen v. Kealey* (1985), 10 O.A.C. 344 (C.A.):

1. The time expended by the solicitor;
2. The legal complexity of the matter dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters in issue;
5. The importance of the matter to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;
8. The ability of the client to pay; and
9. The reasonable expectation of the client as to the amount of fees.

Applying this to *Sax v Newell,* the Court of Appeal made a vague reference to (i) the value of the transaction, (ii) the case's "complications," and (iii) Sax's "time and effort… beyond his time records." It then pulled $100,000, from the air, as the appropriate fee.

The *Cohen* factors grant almost total discretion to a judge deciding what an appropriate legal fee would be. Equally plausible *quantum meruit* cases can be made for an extremely wide range of legal fees. In Sax v. Newell, three experienced and capable adjudicators applying the same test chose $132,000, $22,500, and $100,000.

Emphasizing different facts can make different amounts appear fair and reasonable. Justice Morgan's ruling mentions Sax's 75 hours of work three times and does not mention the value of the transaction at all. Justice Roberts thought a figure four times as large would be reasonable, so she referred to the $14 million figure eight times and did not mention the 75 hours at all. The nine-factor "test" does no analytical work whatsoever. It simply provides nine pegs that a judge can hang his or her hat on after he or she chooses a number that feels right.

In some areas of the law, there might be no alternative to giving judges broad discretion to dispense palm tree justice. However, apart from exceptional cases, legal fees are *not* in this category. Only the final *Cohen* factor – "the reasonable expectation of the client as to the amount of fees" — should be necessary. The client's reasonable expectation should be based on a written retainer, and the lawyer should always ensure that this document exists before starting work. This is obvious to most lawyers, who consistently reach clear and explicit agreements with their clients about fees, before starting work.

There are special cases (such as class actions and clients under a disability) where a judicial role in setting fees might be inevitable. However there is absolutely no reason why Lawrence Sax's representation of Irene Newell had to join this anomalous category. A written agreement about fees at the outset would have provided certainty to both parties. It would have saved them, and taxpayers, the tens of thousands of dollars spent arguing their fee dispute at three levels of court.

At present, our law tentatively recommends explicit agreements about fees but does not insist upon them. The Rules say:

> A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

However failure to do so does not generally lead to discipline, perhaps because "reasonable and practical in the circumstances" leaves much wiggle room. Sax was not disciplined for his approach to the Newell case.

The *Solicitors Act*, which governs the assessment process, requires written retainer agreements only for contingency fees. In *Newell*, the Ontario Court of Appeal missed an opportunity to establish a clear expectation that *all* retainers be in writing, absent exceptional circumstances.

Kryptonite for Legal Ethics

Legal practice without a retainer endangers lawyer, client, and the reputation of the legal profession generally. Doing so — unless the file is *pro bono* — places a lawyer in the ethically impossible position of judging for him or herself what fee would be appropriate. Deciding how much one should be paid from someone else's money is an obvious conflict of interest. Allowing it to persist tends to undermine lawyer-client relationships generally.

A written retainer is no impediment to creative and flexible practice. A time-based fee might have been inappropriate for Sax and Newell. Such an arrangement would require Newell to pay Sax even if the transaction failed completely, and it would provide no incentive for him to obtain the largest possible sale price as quickly as possible. However contingency fees, flat fees, and any number of innovative hybrids are now allowed. Lawyers and clients both benefit from flexibility in fee arrangements, but intelligent drafting can readily reconcile the value of flexibility with the certainty offered by a written contract.

Irene Newell was ready and willing to make use of the assessment procedure. Unfortunately, many inexperienced clients are not, and this makes them easy prey for unethical lawyers choosing their own fees. Assessment means challenging an authority figure (one's lawyer), and doing so on the lawyer's home turf (court). This is a huge impediment for clients who are non-confrontational, not to mention those who are incarcerated or out of the country. As this space has argued before, the assessment procedure is no substitute for clear guidelines around ethical billing.

Some issues in legal ethics and lawyer regulation are inherently divisive, and touch on deep-seeded differences in values. Other problems, like this one, should be easy to solve. Removing this ethical kryptonite is simply a matter of requiring every lawyer to consistently take a common sense step that the overwhelming majority already always do take.

Comments

Jody Berkes
October 17th, 2019 at 3:25 pm

While I agree that fees should explicitly be set out in writing at the beginning of a retainer, and it is my personal practice to quote my hourly rate and daily counsel fee for court time. (As an aside, even when the fees are explicitly set out, clients still complain.) However, there does need to be adequate compensation for the complex work a lawyer undertakes.

Access to Justice is often used as a euphemism for arguing lawyers charge too much. I am reminded of a story of a contract lawyer. A client came to him and asked him to write a partnership agreement for the next day. The lawyer undertook the work, and produced an excellent agreement that met all the client's needs. The client was happy with the work until the lawyer presented him with a bill. The client said this is outrageous you only worked on this for a maximum of 24 hours and I am assuming you slept some.

The lawyer responded you paid X for the 24 hours of work. The rest is for my 30 years of experience that enabled me do the impossible and write this thing in 24 hours. Clients are demanding flat fee retainers and value for work remuneration. Fair enough, but the value for work performed proposition should work both ways. $165,000 is just over 1% of the value of the deal. I am not sure that is completely out of line with the work performed. Perhaps that is what the Court of Appeal was thinking. The practice of law is a profession, an honourable profession of which I am proud to be a member. I devote a significant amount of time to community

engagement through the Ontario and Canadian Bar Associations. However, the practice of law is also a business. If I cannot charge appropriate fees, then I will be out of business, which means I can't help anyone.

Noel
October 21st, 2019 at 12:47 pm

Thank you for your comment. I totally agree that regulation must not undermine fair and reasonable compensation for legal work. We must never impose a straitjacket preventing fees from reflecting experience, urgency, or the value of what's at stake.

However the written retainer contract seems less a straitjacket than a closet of options suitable for any weather. $165k, or 1% of the sale price, might well have been the right fee for Sax's work on behalf of Newell. I just don't think Sax, or any judge, has the right to make that decision without Newell's consent to a clear and explicit contingency fee agreement.